

Cite as 2010 Ark. 340

SUPREME COURT OF ARKANSAS

No. 10-656

MONTICELLO HEALTHCARE
CENTER, LLC d/b/a MONTICELLO
HEALTHCARE CENTER;
PERENNIAL HEALTHCARE
MANAGEMENT, LLC; PERENNIAL
LEASEHOLDINGS 6, LLC;
PERENNIAL HEALTH CARE
HOLDINGS, LLC; V. JAMES
SANTARSIERO; SHARON DRAKE,
IN HER CAPACITY AS
ADMINISTRATOR OF MONTICELLO
HEALTHCARE CENTER
APPELLANTS

V.

CHEYENNE FORREST, AS SPECIAL
ADMINISTRATOR OF THE ESTATE
OF KATHLEEN MARGARET JONES,
AND ON BEHALF OF THE
WRONGFUL DEATH BENEFICIARIES
OF KATHLEEN JONES
APPELLEE

Opinion Delivered September 23, 2010

APPEAL FROM THE DREW
COUNTY CIRCUIT COURT
[NO. CV2008-136-3]
HON. ROBERT BYNUM GIBSON,
JR., JUDGE

MOOT IN PART; REVERSED IN
PART; DISMISSED IN PART.

ELANA CUNNINGHAM WILLS, Associate Justice

Appellants Monticello Healthcare Center, LLC d/b/a Monticello Healthcare Center; Perennial Healthcare Management, LLC; Perennial Leaseholdings 6, LLC; Perennial Health Care Holdings, LLC; V. James Santarsiero; and Sharon Drake, in her capacity as Administrator of Monticello Healthcare Center (collectively “MHC”) bring this

interlocutory appeal from four separate orders of the Drew County Circuit Court in a medical-malpractice action brought by appellee Cheyenne Forrest, as Special Administrator of the Estate of Kathleen Margaret Jones and on behalf of the wrongful-death beneficiaries of Kathleen Jones. MHC raises three arguments on appeal, contending that the circuit court (1) abused its discretion when it enjoined MHC from transferring assets; (2) abused its discretion when it enjoined MHC and its insurers from paying attorneys' fees for the defense of the case; and (3) lacked authority to order MHC to produce a history of attorneys' fees paid. For the reasons set forth in detail in the companion case of *Monticello Healthcare Center, LLC v. Goodman*, 2010 Ark. 339, 373 S.W.3d 256, we hold that MHC's appeal of the first order is moot; we reverse the circuit court's orders prohibiting the payment of attorneys' fees; and we dismiss the portion of MHC's appeal challenging the circuit court's order to produce a history of attorneys' fees paid.

The present appeal began as a medical-malpractice action filed by Cheyenne Forrest, as special administrator of the estate of Kathleen Margaret Jones and on behalf of the wrongful-death beneficiaries of Kathleen Jones. The complaint, which was filed on July 15, 2008, listed causes of action for negligence under the Arkansas Medical Malpractice Act; negligence; violations of the Arkansas Long Term Care Residents' Rights Act; "civil liability for conduct constituting felony neglect of an endangered or impaired adult"; premises liability; *res ipsa loquitur*; breach of informed consent and breach of fiduciary duty; breach

of contract; violations of the Arkansas Deceptive Trade Practices Act; wrongful death; and survival.

On May 28, 2010, Forrest filed a “motion for injunction or temporary restraining order and discovery bond and other sanctions.” In this motion, she alleged that the defendants had “hidden from counsel for plaintiffs and this court their efforts to sell assets of defendants under circumstances that will cause irreparable harm to plaintiffs.” Forrest’s motion further alleged that the defendants had also engaged in “fraudulent and misleading behavior” by delaying the litigation until the “sales transactions become final and the defendants thereby insulate themselves from financial accountability.” She argued that the defendants’ conduct and the proposed sale would result in irreparable harm if a preliminary injunction were not immediately granted, and thus she asked the court to enter an order preventing the defendants “from taking any action associated with any sale or attempted sale of any entity or asset of any defendant pending further order of the court.”

In support of this motion, Forrest attached a May 4, 2010 letter from James Santarsiero, the CEO of Perennial Healthcare Management, to the Arkansas Office of Long Term Care providing “notice of change of operational control” of several nursing homes due to the expiration of his company’s lease. She also incorporated a motion to enforce a settlement agreement in a separate lawsuit, *Lambert v. Monticello Healthcare Center, LLC*, Drew County Circuit Court No. CV-2008-0120-4, in which allegations were raised that MHC had refused to comply with the terms of a settlement agreement reached by the parties.

Forrest's motion was also supported by an affidavit from forensic-accounting expert Bruce Engstrom, who opined that the "sale" of the Monticello Healthcare Center and other nursing homes operated by the Perennial business entities could "result in a corporate shell with unfunded liabilities, either perfected or asserted, and no future cash flows to repay these liabilities over time."

The circuit court held a hearing on Forrest's motion on June 2, 2010, and subsequently entered an order ("Order No. 1") on June 7, 2010, that "forthwith enjoined [all defendants] from transferring any interest in or asset of any defendant including but not limited to licenses unless and until defendants post a bond in the sum of \$300,000.00 to assure at least partial collection of any settlement or judgment in favor of Plaintiff."

On June 9, 2010, Forrest filed an amendment to her complaint. In the amendment, she alleged that defense counsel disclosed at the June 2 hearing that the insurance company for the defendants has a "wasting policy provision." Forrest argued that wasting provision was void for numerous reasons and asked the court to issue an "immediate injunction against the insurance company . . . attempting to utilize the wasting policy provision" and to issue a declaratory judgment to the effect that the wasting policy provision was void. Forrest also filed a second amendment to her complaint on June 11, 2010, contending that the circuit court should apply the Arkansas Fraudulent Transfer Act, Ark. Code Ann. § 4-59-201 et seq. (Repl. 2001), to the facts of the case.

On June 14, 2010, Forrest filed a motion for a restraining order, this time seeking to enjoin the insurance companies for the defendants from paying any further attorney's fees until the court could consider the issues concerning the wasting provisions in the insurance policies. Here, she argued that the defendants' attorneys might "draw down all of the fees and reduce the amount of coverage available." After a hearing conducted by conference call on June 15, 2010, the court entered an order granting the motion on June 21, 2010, prohibiting the defendants and their insurers from paying attorneys' fees "in the sum of approximately \$360,646.96" ("Order No. 2"). The court entered an additional order the same day ("Order No. 3"), again enjoining payment of attorneys' fees and also ordering and directing, on its own motion, the State of Arkansas, the Arkansas Department of Health and Human Services, and the Office of Long Term Care to provide Forrest with any information relevant to "any attempted transfers of operational control" of the nursing home. The court also enjoined the State from granting any approval or license for a new nursing home or authorizing any change in operational control at the Monticello facility.

Also on June 21, the court entered an "order concerning pretrial conference on June 15, 2010" ("Order No. 4"). In this order, the court ordered the defendants to provide to the court and the plaintiff "a complete history of the funds paid under the insurance policies and the payment of insurances fees" discussed in a June 10, 2010 letter. In that same order, the court

on it's [sic] own motion, is making the following entities parties to this lawsuit: American Safety Indemnity Company, Lexington Insurance Company, Illinois Union

Insurance Company, State of Arkansas, Arkansas Department of Health and Human Services and Office of Long Term Care.

MHC filed a notice of appeal as to Order No. 1 on June 22, 2010, and a first amended notice of appeal on June 23, 2010. Also on June 23, Forrest submitted a letter to the circuit court asking the court to set aside the restraining order resulting from the June 2 hearing. Forrest conceded that the court's restraining order might have the "unintended effect of causing a loss of beds allocated locally and should therefore be set aside." The court entered an order that same day setting aside its "order restraining the transfer of this facility and any State action in approving or accomplishing the same" and providing that "[a]ll other orders, not injunctive in nature, remain." MHC also filed, on June 23, a notice of appeal of the June 21 orders (Orders No. 2, 3, and 4).

This court subsequently granted MHC's motion to stay the circuit court's orders and ordered expedited consideration of the appeal. On appeal, MHC urges that the circuit court erred in enjoining the defendants from transferring any assets, enjoining them from paying any attorneys' fees; and ordering them to produce a history of all attorneys' fees paid.

As the arguments in this case and in *Goodman* are identical,¹ we do not repeat the conclusions of that opinion here. Suffice it to say, the circuit court's setting aside of Order No. 1 renders MHC's arguments on that issue moot, as any decision rendered on the validity

¹The only difference between the two cases is the presence of Order No. 2 in the instant case. Because that order, like Order No. 3, granted an injunction prohibiting the payment of attorneys' fees for the defense, we treat it and Order No. 3 no differently than the circuit court's "Order No. 2" discussed in the *Goodman* opinion.

Cite as 2010 Ark. 340

of that order would have no practical legal effect upon the cause. *See Kinchen v. Wilkins*, 367 Ark. 71, 238 S.W.3d 94 (2006). Regarding Orders No. 2 and 3, which enjoined the payment of attorneys' fees, it is clear that the circuit court abused its discretion in issuing injunctive relief where not only did the plaintiff's motion for restraining order fail to allege either that she would suffer irreparable harm or that there was a likelihood of success on the merits, but the circuit court failed to make the required findings on those matters. *See Ark. R. Civ. P. 65; Baptist Health v. Murphy*, 365 Ark. 115, 226 S.W.3d 800 (2006). We therefore reverse the circuit court's Orders No. 2 and 3. Finally, with respect to Order No. 4, that order was not injunctive in nature; rather, it was an order relating to a discovery matter, and it thus was not properly the subject of an interlocutory appeal under Ark. R. App. P.–Civ. 2(a)(6). Therefore, the portion of MHC's appeal pertaining to Order No. 4 must be dismissed.

Moot in part; reversed in part; dismissed in part.

Quattlebaum, Grooms, Tull & Burrow, PLLC, by: *Michael N. Shannon*, for appellant V. James Santarsiero.

Hardin, Jesson & Terry, PLC, by: *Kirkman T. Dougherty*, for appellant Monticello Healthcare Center, LLC.

Cite as 2010 Ark. 340

Anderson, Murphy & Hopkins LLP, by: *Brett D. Watson*, for appellants Perennial Healthcare Management, LLC, Perennial Leaseholdings 6, LLC, and Perennial Health Care Holdings, LLC.

Ludwig Law Firm, by: *Gene Ludwig*, and *David Hodges*, for appellee.